

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-185046

DATE: July 19, 1976

MATTER OF: Harry Kahn Associates, Inc.

61132

97908

**DIGEST:**

1. Special standards of responsibility set forth in request for proposals which solicited only price proposals are not evaluation factors bearing on technical acceptability of proposals but are definitive criteria of responsibility which must be met as prerequisite to affirmative determination of responsibility of prospective contractor.
2. Where corporate offeror has been incorporated less than 3 years, requirement that offeror's top management personnel have been with company an average of 3 years may be satisfied by including length of service with prior company since record shows that offeror took over prior company's assets and personnel and continued operations at same location with only change of name and ownership.
3. Employment of full-time engineer and four part-time engineers who are available for full-time work satisfies provision of responsibility criteria requiring only that four engineers be "on board" as nucleus around which contractor could expand its capability.

Harry Kahn Associates, Inc. (HKA) protests the award to J.A. Niland and Associates, Inc. (Niland), of a contract for an indefinite quantity of supplies and services necessary for preparation of technical instructions data, under request for proposals (RFP) No. F09603-75-R-0692, issued March 25, 1975, by the Warner Robins Air Logistics Center (WRALC), Robins Air Force Base, Georgia. HKA claims that award to Niland was improper because Niland did not meet certain eligibility standards set forth in the RFP.

The RFP solicited only price proposals and contemplated that award would be made to the lowest acceptable offeror. In addition, the RFP set forth special standards of responsibility with respect to plan and organization for performance, equipment and facilities, management personnel, technical personnel, and inspection system. HKA asserts that Niland did not meet

the requirements of those special standards in the areas of management and technical personnel.

The applicable portions of the RFP dealing with these standards are set forth below:

"C-41. DEMONSTRATION OF RESPONSIBILITY

"Special Standards: Special Standards of Responsibility have been developed and made applicable to this procurement. The standards are as follows:

\* \* \* \* \*

"AREA: 3 - MANAGEMENT PERSONNEL

"ITEM: Qualifications of Management Personnel.

\* \* \* \* \*

"STANDARD: This standard is met when there are at least three people in the top management category. Standard requires \* \* \* average length of time with the company shall be three years."

"AREA: 4 - TECHNICAL PERSONNEL

"ITEM: Quality of Personnel with Required Skills.

\* \* \* \* \*

"STANDARD: Purpose is to determine that:

\* \* \* \* \*

"b. The contractor has at least a nucleus of personnel around which he could expand his capability without jeopardizing proficiency levels.

"c. The contractor has the necessary personnel commitments to expand his work force to perform under the proposed contract. Standard is met when the contractor has the following minimum number of personnel and personnel commitments:

	<u>No. of Persons on Board</u>	<u>Employment Commitment</u>
***	***	***
***	***	***
Engineers	4	6"

HKA asserts that Niland does not meet these standards because its top management personnel could not have been with the company for 3 years since Niland was incorporated less than 3 years ago and because Niland, at the time of proposal submission, had only one full-time engineer on its payroll. HKA further asserts that the special standards "relate specifically to award eligibility and are to be applied, as written, equally and impartially on the basis of the data submitted in each proposal." In this regard, HKA suggests that these standards are not general responsibility provisions, but are "restrictive special standards \*\*\* which are, in effect, a pre-qualification and pre-screening of potential bidders." As such, HKA states, they must be applied literally and as part of the evaluation of proposals.

It is true, as the protester points out, that in negotiated procurements procuring activities frequently evaluate and compare proposals in areas such as understanding work requirements and offeror capability to meet those requirements, even though those areas also relate to a prospective contractor's responsibility. See, e.g., 53 Comp. Gen. 388 (1973); 52 *id.* 854 (1973); Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366; Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410. However, this does not mean that in every negotiated procurement such areas must be considered in proposal evaluation rather than in determining offeror responsibility. Here it is eminently clear from the RFP and from other documents of record that the Air Force intended to consider these areas as part of its responsibility determination and not as part of a proposal evaluation. For example, the RFP itself explicitly referred to the various special standards as bearing on offeror responsibility, and those standards were not included in the RFP section on evaluation. The RFP further provided that while documentation to show compliance with the special standards should be submitted with proposals, such documentation, if not so submitted, "must be ready and available on the date of commencement of the Pre-Award Survey \*\*\*." In addition, the Air Force procurement file contains a memorandum indicating that the special standards were developed pursuant to Armed Services Procurement Regulation (ASPR) § 1-903.3 (1975 ed.), which authorizes development of special standards of responsibility.

Accordingly, we cannot agree that these special standards should have been considered in the evaluation of proposals or that they are anything other than criteria for determining responsibility.

We have recognized, however, a distinction between the general standards of responsibility, e.g., financial resources, prior performance record, integrity, set forth in ASPR § 1-903.1, and definitive criteria of responsibility which an agency may include in a solicitation. See Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. With regard to the latter, we have recently held that such definitive criteria cannot "be waived as the contracting officer sees fit" because "to do so would be misleading and prejudicial to other bidders which have a right to rely on the wording of the solicitation and thus to reasonably anticipate the scope of competition for award," and that therefore "meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actually a prerequisite to an affirmative determination of responsibility." Haughton Elevator Division, et al., B-184865, May 3, 1976, 55 Comp. Gen. \_\_\_\_, 76-1 CPD \_\_\_\_. Thus, what must be dispositive of this case is whether the contracting officer's affirmative determination of responsibility with respect to Niland was reasonably based on a finding that Niland could meet the special standards set forth in the RFP.

The record shows that the contracting officer specifically considered Niland's compliance with the special standards requirements in question. A pre-award survey on Niland was performed by the Defense Contract Administration Services Office (DCASO), San Antonio, Texas, with participation by WRALC personnel. The report submitted by DCASO recommended complete award; however, the WRALC participants recommended a negative preaward survey because, inter alia:

"The three top management personnel had less than two years' average time with the company, whereas the standard requires an average of three years with the company. The company was formed in August 1973.

"There was only one (1) fulltime engineer on board, whereas the standard requires four (4) engineers on board."

Because of this negative recommendation, the matter was referred to the DCASR--Dallas Regional Pre-Award Survey Review Board. The Board, after its review of the various team reports, the solicitation and other relevant data submitted by Niland and incorporated into the pre-award survey report, determined that all questions regarding Niland's responsibility were satisfactorily answered in the affirmative by the pre-award survey and recommended complete award. Its report read in pertinent part:

"First, the WR/ALC team report states the offeror does not have three top management personnel with an average length of time with the company of three years. However, the PAS report contains a submission from the offeror, dated 15 July 1975, listing the years of continuous tenure of Messrs. [names omitted]. This data reflects these three top management personnel have an average of 10 years tenure with the company. Fundamentally the position of the WR/ALC report is based on the premise that as the offeror was incorporated under the name J. A. Niland and Associates, Inc. in August 1973, then it is impossible for any employee to have three years experience with the firm. The Board concluded, however, that the offeror does meet this standard because the solicitation (Area 3 - Management Personnel, Section C, para. C-41 of the RFP) only requires three years experience with the company without placing restrictions on or defining special conditions regarding ownership of the company. The subject employees have, in essence, been employed for more than an average of three years by the same company although ownership of the company did change in 1973. It is not unusual for example, for employees to be considered under continuous employment by a particular company although ownership of the company may have changed many times in a single day through stock transactions. Therefore, the issue of company ownership does not influence the status of the offeror's responsibility under this area of the RFP special standards.

"Secondly, the WR/ALC report states the RFP special standards require four engineers on board but the offeror only has one full time engineer.

on board. The PAS Review Board takes the position that the offeror does meet this standard by having one engineer full time, one on a 32-hour week, and three part-time engineers on the payroll. The RFP does not require the engineers employed by the offeror to be working any specific number of hours per week before they can be considered to be 'on board'. The part-time engineers are on the payroll and are available for full time work if and when required."

After considering the pre-award survey report, the affirmative recommendation of the Board, and the opinion of legal counsel regarding the propriety of considering the experience of Niland personnel obtained prior to Niland's incorporation, the contracting officer determined Niland to be responsible.

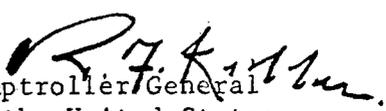
We think the contracting officer's determination was consistent with the special standards and did not, as asserted by the protester, represent a relaxation of those standards for the benefit of Niland. We have long recognized that an evaluation of corporate experience need not be limited to the time from which the corporation began its legal existence. For example, in 36 Comp. Gen. 673, 674 (1957) we said it would not be improper, in evaluating the experience of a corporation, for an agency to consider the experience of a predecessor firm or of the corporation's principal officers which was obtained prior to the incorporation date. In Haughton Elevator Division, et al., supra, we held that since this prior experience could be considered, "the mere fact that the corporation had only been in existence since early 1975 is not determinative of its ability to meet the 'approximately 5 years' experience requirement" of the solicitation. See also Hydromatics International Corporation, B-180669, July 29, 1974, 74-2 CPD 66; 38 Comp. Gen. 572 (1959); and Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121 (in which we held that a procuring agency could properly consider the performance record of a bidder under two prior corporate names in determining whether to grant a waiver of first article testing). Here, the record indicates that shortly after Niland was incorporated it took over the assets and personnel of another firm with several years of experience in performing the type of work required by this procurement. In other words, while there was a change of ownership and corporate name, the operations of the predecessor firm continued at the same location and under the guidance of the same personnel. Under these circumstances, and in view of the cases cited above, we think, for purposes of satisfying the special

standards of responsibility, that the length of time Niland's top management employees spent with the predecessor company may be considered to be time "with the company" as that term is used in the special standards. Since the record further indicates that Niland's three top management personnel have an average of 10 years tenure with the predecessor company and with Niland, we believe the 3 year requirement was satisfied.

With regard to the number of engineers on its payroll, the record shows that Niland had one full-time engineer in its employ, one engineer who was working 32 hours per week, and three part-time engineers who were available for full-time work. The special standards did not require that all four engineers be full-time in order to be considered "on board." The fact that they were all on the payroll and available for full-time work, we think, was sufficient to provide "a nucleus of personnel around which the contractor could expand his capability." Accordingly, we agree with the Review Board and the contracting officer that Niland satisfies this requirement of the special standards also.

Several weeks after the close of the record in this case, the protester alleged for the first time that the contract had been awarded illegally because the Air Force knew, prior to award, that Niland was incapable of providing performance charts for C-123 aircraft. In response, the Air Force states that it "has not determined that Niland is technically unqualified to perform any of the contract requirements," and that in fact the contract does not require preparation of such charts. In light of this explanation, and in view of the protester's failure to furnish additional details on this matter as requested, we see no need to consider this allegation further.

For the foregoing reasons, the protest is denied.

Deputy:   
Comptroller General  
of the United States